STATE OF MICHIGAN

COURT OF APPEALS

JOEANN BATES,

Plaintiff-Appellee,

v

DR. SIDNEY GILBERT,

Defendant-Appellant,

and

D&R OPTICAL CORPORATION, d/b/a HEATH CENTER OPTICAL,

Defendant.

UNPUBLISHED
August 16, 2005

No. 252022, 252793
Wayne Circuit Court
LC No. 03-308969-NH

JOEANN BATES,

Plaintiff-Appellee,

v

DR. SIDNEY GILBERT,

Defendant,

and

D&R OPTICAL CORPORATION, d/b/a HEATH CENTER OPTICAL,

Defendant-Appellant.

No. 252047, 252792
Wayne Circuit Court
LC No. 03-308969-NH

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

DONOFRIO, J. (*dissenting*)

I respectfully dissent. I conclude that because plaintiff's affidavit of merit did not fulfill statutory requirements necessary to commence a medical malpractice action, and any belief to the contrary on behalf of plaintiff's attorney was unreasonable, the trial court should have granted defendants' motion for summary disposition. Therefore, I would reverse the trial court as a matter of law in Docket Nos. 252022 and 252047.

The issue before this Court addresses the applicability of MCL 600.2169(1)(b), regarding an affidavit of merit filed pursuant to MCR 600.2912d, in a medical malpractice action against a non-physician who is not a specialist or general practitioner. After reviewing the record I conclude that: (1) MCL 600.2169(1)(b) applies to actions against a non-physician who is not a specialist or general practitioner; and (2) plaintiff's expert, an ophthalmologist, was not qualified to sign the affidavit of merit because during the year immediately preceding plaintiff's eye examination, he did not devote a majority of his professional time to the same health profession as Gilbert, optometry, and plaintiff's attorney's belief to the contrary was unreasonable.

The Legislature has allowed medical malpractice actions against any licensed health care professional, including such non-physicians such as nurses, medical technologists, physical therapists, and optometrists. MCL 600.2912; MCL 600.5838a(1); MCL 600.5838a(1)(b); *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 19-20; 651 NW2d 356 (2002).; *Adkins v Annapolis Hosp*, 420 Mich 87, 94-95; 360 NW2d 150 (1984); *Tobin v Providence Hosp*, 244 Mich App 626, 670-671; 624 NW2d 548 (2001). The plain language of MCL 600.2912d indicates that an affidavit of merit is required in every medical malpractice action, including those initiated against non-physicians. The plaintiff's attorney must "reasonably believe" that the affidavit of merit "meets the requirements for an expert witness under section 2169." MCL 600.2912d(1); also see *Grossman v Brown*, 470 Mich 593, 599; 684 NW2d 198 (2004).

"The statutory provision governing expert witnesses in medical malpractice cases, MCL 600.2169, 'contains strict requirements concerning the qualification of expert witnesses in medical malpractice cases.'" *Hamilton v Kuligowski*, 261 Mich App 608, 610; 684 NW2d 366 (2004) (quoting *McDougall v Schanz*, 461 Mich 15, 28; 597 NW2d 148 (1999)). Whereas MCR 600.2169, subsections (a) and (c) apply exclusively to specialists and general practitioners, subsection (b) makes no qualification on its applicability and, therefore, must be deemed to apply generally to all malpractice actions, including those initiated against non-physicians. See *Halloran v Bhan*, 470 Mich 572, 586 (J. Kelly, dissenting); 683 NW2d 129 (2004); *Hamilton*, *supra* at 610-611. Specifically, subsection (b), MCL 600.2169(1)(b)(i), states that an expert witness must devote "a majority of his or her professional time" to the "active clinical practice of the same health profession" as the defendant. *Hamilton*, *supra* at 610.

Although the parties agree that Dr. Hamburger, plaintiff's expert and ophthalmologist, did not devote a majority of his professional time to optometry, Gilbert's active clinical practice, the trial court determined that plaintiff's attorney's belief that Dr. Hamburger would meet the criteria of MCL 600.2169 was reasonable and found in favor of plaintiff on defendant's summary disposition motion. I agree with defendant's argument that this belief was unreasonable and the trial court erred.

Optometry and ophthalmology are two entirely separate health professions. Optometry is defined by statute, and optometrists are separately licensed and regulated by a board of optometry. See MCL 333.17401(b); MCL 333.17432. Ophthalmology, on the other hand, is not

specifically defined by statute, but has been defined by *Random House Webster's College Dictionary* (1995) as "the branch of medicine dealing with the anatomy, functions, and diseases of the eye." Plainly, ophthalmologists are medical physicians, while optometrists are not. See *Williamson v Lee Optical*, 348 US 483, 485-486; 75 S Ct 461; 348 L Ed 483 (1955).

Plaintiff does not deny that her attorney was aware that Dr. Hamburger was an ophthalmologist when she filed her complaint and submitted his affidavit. Where there is no question that a plaintiff's expert did not "devote[ ] a majority of his . . . professional time" to "[t]he active clinical practice of the same health profession" of the defendant against whom the testimony will be offered, as specifically required by court rule and statute, I cannot conclude that plaintiff's attorney's belief to the contrary was reasonable. See MCL 600.2912d(1); *Decker, supra*, 248 Mich App 83-84 (finding the plaintiff's belief unreasonable where the affiant "clearly [did] not satisfy the requirements of MCL 600.2169 and, therefore, would not be qualified to offer expert testimony" on the appropriate standard of practice applicable to the defendant); see also *Geralds, supra*, 259 Mich App 233-234 (finding the attorney's belief unreasonable that affiant physician would fulfill requirements of statute based on an assumption and without any inquiry regarding physician's board certification).

Also, I disagree with the majority's conclusion that *Cox, supra*, did not concern the same issue as presented in this appeal. In *Cox*, the Supreme Court addressed the question of whether nurses were held to the standard of care of a general practitioner or a specialist under MCL 600.2912a. *Cox, supra* at 18. The Supreme Court determined that a nurse did not engage in the practice of medicine, was not a physician, and, therefore, held that neither standard of care of MCL 600.2912a applied. *Id*., at 19. The Supreme Court looked to the common law for the standard of care applicable to nurses because the Legislature had not otherwise provided a standard of care for nurses sued for medical malpractice. *Id*., at 20. The *Cox* Court specifically acknowledged that medical malpractice claims may be initiated against non-physicians such as nurses. *Id*. Therefore, Supreme Court precedent does not support plaintiff's position that MCL 600.2169(1) is not applicable to malpractice actions against non-physicians. I also note that since plaintiff treated this case as a malpractice action by the filing of an affidavit of meritorious claim, the content requirements of MCL 600.2912d are necessarily implicated.

Finally, plaintiff claims that her attorney's belief was reasonable because the mandates of MCL 600.2912d(1) required her to file an affidavit by an ophthalmologist. One of the issues raised by plaintiff's action is whether Gilbert, as an optometrist, had a duty to diagnose glaucoma[1] during his examination of plaintiff. Plaintiff claims that if Gilbert had performed proper testing, her glaucoma would have been discovered and would have been treatable. Plaintiff points out that MCL 600.2912d(1)(d) requires the affiant in the affidavit of merit to make a statement regarding causation, and argues that an optometrist was not qualified to make such a statement, and she, therefore, was required to file an affidavit of an ophthalmologist, a

[1] Glaucoma is defined as "a condition of elevated fluid pressure within the eyeball, caused by an abnormally narrow angle between the iris and cornea or by an obstruction within the canal through which the aqueous humor drains, causing damage to the eye and progressive loss of vision." *Random House Webster's College Dictionary* (1991).

physician with the ability to make such an assessment. Plaintiff, however, following MCL 600.2912d(1)(d), chose to entirely ignore the section of MCL 600.2912d(1)(a)-(c) that requires the affiant expert to qualify under MCL 600.2169 to render testimony against defendant regarding the appropriate standard of care and breach. Again, Dr. Hamburger, as an ophthalmologist, did not qualify to testify regarding the appropriate standard of care applicable to an optometrist pursuant to MCL 600.2169(b), and any belief to the contrary must be deemed unreasonable. Further, even if a statement from an ophthalmologist were required to cover causation, plaintiff could have filed two affidavits to fulfill the statutory mandate.[2]

For all of these reasons, I cannot agree with the majority's view that plaintiff's counsel had a reasonable belief that plaintiff's affidavit of merit, executed by Dr. Hamburger, an ophthalmologist, was valid under MCL 600.2912d as it relates to the alleged malpractice of defendant optometrist.[3]

My resolution of the first issue would ordinarily make further comment unnecessary as it relates to Dockets Nos. 252792 and 252793. However, because the majority remands to the trial court, I am obliged to further comment. The majority finds, "it unnecessary to determine whether MCL 600.2912e(1) standing alone and in the context of the surrounding statutory scheme, prohibits defendant from executing an affidavit of meritorious defense on his or her own behalf, where Gilbert's attorney could have reasonably believed that the affidavit complied with the statute in light of the statutory language that does not specifically preclude a defendant from so doing." For the reasons explained above in this dissent, concerning plaintiff's inability to meet all of the statutory requirements regarding her affidavit of meritorious claim, the same analysis applies regarding Gilbert's affidavit of meritorious defense.

Gilbert acknowledges his lack of capacity to offer an opinion on proximate cause and damages. Therefore, it cannot be reasonable for Gilbert's attorney to believe that Gilbert, as an affiant meets the requirements of MCL 600.2169 when the affiant is precluded by admission from offering an opinion on proximate cause and damages as required in MCL 600.2912e(1)(d). Recall, under my analysis, plaintiff's affiant, Dr. Hamburger, was unable to offer an opinion pursuant to the requirements of MCL 600.2169 regarding standard of care testimony as required by MCL 600.2912d(1)(a)-(c) although he could opine on causation pursuant to MCL 600.2912d(1)(d), and therefore failed to meet the complete criteria. MCL 600.2912d(1). Paralleling plaintiff's situation, Gilbert meets the requirements of MCL 600.2169 with respect to only MCL 600.2912e(1)(a)-(c), but is also unable to offer an opinion on causation and damages as required by MCL 600.2912e(1)(d). Hence, both affiants fail to meet their respective affidavit

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[2] See e.g. *Ohannesian v Hedeman*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2004 (Docket No. 245933), slip op, pp 5-6 (finding the plaintiff's one affidavit insufficient to support the cause of action where it did not provide all information required by statute and stating that a plaintiff may chose to file two affidavits when necessary).

[3] Plaintiff's action was instituted as a negligence action. Because of the majority's determination, it is unnecessary to discuss prospective application pursuant to *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 432; 684 NW2d 864 (2004).

of merit requirements, and both parties' affidavits of merit under the respective sections, MCL 600.2912d and MCL 600.2912e, are ultimately non-conforming. By equal analysis of the two affidavit requirement sections, defendant's affidavit of meritorious defense would also require two affidavits, one by an optometrist relating to MCL 600.2912e(1)(a)-(c) and one by an ophthalmologist relating to MCL 600.2912e(1)(d). Or, defendant could have submitted a single affidavit countersigned by two appropriate affiants with respect to their representative parts.[4]

I agree with the majority reversal of the sanctions imposed against defendants, however, for a different reason. I conclude that no sanctions are available against defendants in this case and remand is inappropriate. MCL 600.2912e(1) provides in relevant part: "the defendant's attorney shall file not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit *required* under section 2912d an affidavit of meritorious defense . . . ." (Emphasis added.) While plaintiff's attorney's reasonable belief that the affidavit of meritorious claim met the requirements of MCL 600.2169 as applied to MCL 600.2912d(1)(a)-(d), such reasonable belief only excuses the deficiency of the affidavit for the purposes of filing the complaint. Until plaintiff's affidavit meets all of the criteria of MCL 600.2912d(1)(a)-(d), defendants obligation to file an affidavit of meritorious defense pursuant to MCL 600.2912e(1) is not triggered because plaintiff's have not filed the "required" conforming affidavit. MCL 600.2912e(1). Sanctions against defendants, therefore, were improperly imposed.

/s/ Pat M. Donofrio

[4] Because the majority does not decide the issue concerning a self-executed affidavit by an involved defendant I do not address this point.